Supreme Court of the United States

OCTOBER TERM, 1960

No.

DAVID GINSBURG ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

GERSON ASKINAS
Counsel for Petitioners
347 Worthington Street
Springfield 3, Massachusetts

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners, David Ginsburg and Freida Ginsburg pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on April 18, 1960.

Citations to Opinions Below

The opinion of the District Court (R. 17-18)[1] is reported in 178 F. Supp. 503. The opinions of the Court of Appeals are as yet unreported. They appear at pages 14 and 18, *infra*.

[1] R. references are to the Record Appendix filed in the Court of Appeals.

Jurisdiction

The judgment of the Court of Appeals was entered on April 18, 1960. A petition for rehearing filed May 3, 1960 was denied on May 20, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented

Internal Revenue Code of 1939 provides substantially as follows:

Section 272. Procedure in General. This section provides that where the Commissioner determines that there is a deficiency in respect to a tax imposed, etc., any taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. No assessment of a deficiency shall be made until the decision of the Tax Court has become final.

Section 273. Jeopardy Assessments. This section of the act provides a method of assessment and collection where the Commissioner believes that the assessment or collection of a deficiency in tax will be jeopardized by delay.

Section 294 (b). Deficiency. This section provides that where a deficiency or any interest or additional amounts assessed in connection therewith is not paid in full within 10 days from the date of notice and demand, there shall be collected as a part of the tax, interest upon the unpaid amount from the date of notice and demand until date of payment.

The questions presented are:

1. Whether the Commissioner's right to assess under Section 273 interferes with the rights of any taxpayer under Section 272.

2. Whether Section 294 (b) intended to include jeopardy assessments.

3. Whether Section 294 (b) did not become operative until after determination by Tax Court.

4. Whether Section 294 (b) was to apply to Section 273 or to determination by Tax Court.

5. Whether the Commissioner is prohibited from collecting interest upon that portion of the amount of a jeopardy assessment which includes deficiency interest because Section 294 (b) does not specifically mention jeopardy assessments.

6. Whether it was the intent of Congress to assess interest on interest under Section 294 (b) on jeopardy assessments where the taxpayer had appealed to the Tax Court under Section 272.

7. Whether the collection of interest on interest where no bond is filed is discriminatory, illegal and unconstitutional.

Statutory Provisions Involved

The statutory provisions involved are: Internal Revenue Code of 1939 — Sections — 272(a)(1), 273(a)(b)(f)(i), 292(a), 294 (b)(c) and 297. They are printed in Appendix C, infra, pp.

Statement

This is an action brought under the Internal Revenue Code of 1939 for the recovery of delinquency interest paid

by the taxpayers upon deficiency interest and fraud penalties in connection with a jeopardy assessment, from the date of notice and demand March 24, 1952 to the date of payment which was sometime in the year 1957.

There is no dispute as to the material facts, a stipulation (R. 15-16) having been filed. Petitioners filed timely petitions with the United States Tax Court seeking redetermination of their liability for the years involved. No bond to stay collection of the jeopardy assessments was given by the petitioners pursuant to section 273 (f) of the Internal Revenue Code of 1939. On December 12, 1956, pursuant to stipulations entered into between the petitioners and the Commissioner of Internal Revenue, the Tax Court duly entered its decisions which held that petitioners were liable for deficiencies and fraud penalties for a much smaller amount than the original jeopardy assessment. Thereafter, the District Director of Internal Revenue at Boston, Massachusetts revised the jeopardy assessments which had been made on March 21, 1952. The petitioners paid the delinquency interest as demanded by the commissioner. On October 15 and 22, 1957, the petitioners filed timely claims for refund of that portion of the delinquency interest allocable to the assessed interest and fraud penalties. The government further agreed that there had been an overpayment of $446.76. Both parties filed motions for summary judgment and on December 9, 1959, after hearing, defendant's motion was allowed, but due to errors in computation of delinquency interest assessments which resulted in an actual overpayment of assessments by the plaintiffs, and in accordance with the stipulation of the parties, it is Ordered—Judgment for the plaintiffs in the amount of $446.76. The findings and conclusion of the District Court were that where no bond has been filed to stay collection of a jeopardy assessment, the provisions of §294 (b) are applicable and hence the commissioner in this case prop-

erly assessed delinquency interest on the interest and penalties included in the jeopardy assessment.

On appeal, the Court of Appeals affirmed the judgment of the District Court, said appellate court adopting a construction of Sections 297 and 273(i) which is erroneous in that it ignored the established principle that Tax Court determinations never include interest. Upon rehearing the Court of Appeals once more misconstrued the statutes and the petition for rehearing was denied.

Reasons for Granting the Writ

1. The District Court and the Court of Appeals have misconstrued the interpretation intended by Congress, when it enacted Section 273—Jeopardy Assessments. It did not intend to deny the taxpayer the right to proceed under Section 272. In the ordinary case, the Commissioner must, before assessing a deficiency, send a deficiency notice to the taxpayer, after which the taxpayer has 90 days within which to petition the Tax Court for a determination. (1939 Code, §272). If such a petition is filed, there is no assessment and no notice and demand for payment of the tax until after the Tax Court's decision is final, and hence no compounding of interest during the pendency of the case in the Tax Court.

An uncertainty or ambiguity appears in the 1939 Code, however, with respect to interest in the case of jeopardy assessments. Section 273 provides that if the Commissioner believes that the collection of a deficiency will be jeopardized by delay, he may assess such deficiency immediately without a prior notice to the taxpayer and without a prior opportunity to litigate the matter before the Tax Court. The Commissioner may then proceed to enforce collection of the tax so assessed unless the taxpayer is able to post a bond in double the amount as to which the stay is

desired. The purpose of the bond is to prevent the liquidation of the Taxpayer's assets. Whether or not such a bond is filed, the taxpayer has the right to petition for a redetermination of these deficiencies and the matter is heard in the Tax Court the same way as an ordinary proposed deficiency assessment.

2. An analysis of Section 294 (b) leads to the conclusion that Congress did not intend the compounding of interest prior to the Tax Court's redetermination in jeopardy assessment cases, whether or not a bond is filed. Congress did not intend to discriminate between taxpayers and did not intend the penalty that the Commissioner is imposing by compounding interest on interest. Congress intended this section to start running after the Tax Court's redetermination. The collection of interest on interest is authorized only when if the deficiency or interest assessed in connection therewith, is not paid in full within ten days from the date of notice and demand from the collector. The question is whether the 1939 Code authorizes collection of interest on interest during the period after the jeopardy assessment, and prior to the notice and demand for collection which is issued by the Collector after the Tax Court's decision has become final. An important aspect of that question is whether its answer turns on whether or not a bond is filed to stay collection of the tax during the pendency of the matter before the Tax Court. The provision for jeopardy assessments has been in the Code since 1924. Its general purpose is plain: to secure to the Government immediate control of the taxpayer's property in cases where the lapse of time might result in failure of collection. The Commissioner is given wide discretion, which is not subject to review, to determine which cases are proper subjects for jeopardy assessment.

Hutchinson Coal Co., 24 B.T.A. 973, affirmed 64 Fed. (2nd) 275, certiorari denied 290 U.S. 652.

The Code was amended in 1953 to give the Commissioner the further authority to abate a jeopardy assessment previously made if he finds that jeopardy does not exist. The Senate Report accompanying the bill which added that provision contains the following:

> "Under existing law, if the Bureau of Internal Revenue believes that ultimate collection of a tax is in danger, it may make a so-called jeopardy assessment. This an arbitrary assessment designed to get control of available assets of the taxpayer pending final determination of the liability if any.
>
> This bill simply permits the revocation of a jeopardy assessment whenever it appears that there is, in fact, no danger of losing any tax which may be due. . . ." (1953 U.S. Code, Cong. and Adm. News, p. 2398.)

Such being the Congressional understanding of the purpose of jeopardy assessments, and the Commissioner having been given such broad discretion, it seems unlikely that Congress intended to exact an additional sum of money from taxpayers in jeopardy cases, whether in the form of interest on interest, or otherwise. The language of the pertinent 1939 Code provisions, all considered, lead to the conclusion that there is no interest on assessed interest in jeopardy cases prior to the notice and demand which follows a final Tax Court decision. Statutes levying taxes are not to extend by implication beyond the clear import of the language used, and in case of doubt are construed most strongly against the government.

Crolich v. *United States*, 144 F. Supp. 109 (S.D. Ala.).

3. Section 297 does not authorize collection of interest prior to the finality of the Tax Court's decision. When a taxpayer against whom a jeopardy assessment has been made files his petition with the Tax Court, the Court determines the amount which should have been assessed as the deficiency, just as in the case of an ordinary deficiency. The Tax Court does not determine interest deficiencies in either case. Indeed, it has been repeatedly held that the Tax Court has no jurisdiction over the question of interest.

Commissioner v. *Kilpatrick's Estate*, 140 F. 2nd 887.
U.S. v. *Globe Indemnity Co.*, 94 F. 2nd 576.
1 Casey, Federal Tax Procedure ¶6.51.
10 Mertens Law of Federal Taxation ¶55.02, note 33.

The amount determined by the Tax Court as the deficiency may, of course, be greater or less than the jeopardy assessment, or less than the amount previously collected. Therefore, special provision is made in Section 273 (i) for collecting the difference or refunding the excess to the taxpayer. Section 297 makes special provision for collecting interest after the ruling of the Tax Court in these jeopardy cases. It is very clear that the principal amount on which the interest is to be calculated pursuant to Section 297 is the amount determined by the Tax Court as the amount of the deficiency, and collected pursuant to Section 273 (i): This amount does not include interest, as the Tax Court never determines interest in fixing the amount of the deficiency. On this amount fixed by the Tax Court, the Collector under Section 297 collects interest at the rate of 6% per annum from the date of the jeopardy notice and demand to the date of notice and demand after the determination by the Tax Court has become final. The Collector has already assessed interest at 6% on the jeo-

ardy assessment from the date the tax was due until the date of the jeopardy assessment. Section 297, therefore, does not authorize any compounding of interest prior to the notice and demand which follows the Tax Court's decision, and there is no such authorization in the Code.

Although there is a reference in Section 273 (i) to the collection having been stayed by a bond, it is very clear that whatever the reason for the deficiencies not having been paid prior to the Tax Court's decision, the unpaid amount shall upon that decision becoming final, be collected as part of the tax upon notice and demand from the Collector. If the section applied only to unpaid amounts, the collection of which had been stayed by a bond, there would be no statutory authority for collection upon notice and demand of amounts unpaid but the collection of which had not been stayed by a bond. Obviously, such was not the intention of the section. Rather, the draftsman of the statute seems to have assumed, in view of the general purpose of jeopardy assessments, that unless a bond was filed, the Commissioner would have gone ahead and enforced collection of the tax. This assumption is undoubtedly the explanation for the presence of the language "the collection of which has been stayed by the bond".

Furthermore, Section 273 (i) itself recognizes that there may be amounts unpaid for reasons other than the filing of a stay bond. These sections were apparently intended to provide for the collection of interest on interest in jeopardy cases commencing at the same point in time as in ordinary cases, that is, after the Tax Court's determination becomes final and the collector has issued his notice and demand for payment. This is consistent with the purpose of jeopardy assessments, which concerns the collectibility, not the amount of the tax liability. There would be no justification for penalizing a taxpayer in terms of his total ultimate tax liability as a result of his having been singled out for the

arbitrary jeopardy assessment procedure. Particularly is this so when one considers that there is no provision for a review of the Commissioner's determination of, or abatement of, jeopardy assessments. This is further emphasized by the fact that very often after levying a jeopardy assessment the Government does not follow up and enforce a collection prior to the Tax Court's decision, an indication that collection of the tax was not in much jeopardy, as indicated by this case, since the taxpayer is now suing for [illegible] jeopardy assessments carry an additional dollar liability in the form of compound interest from a point earlier in time than would be true under an ordinary assessment. Jeopardy assessment procedure is an exception to the normally accepted method of assessment and collection of taxes and it should not be used either as additional penalty or in any other improper manner.

Darnell v. *Tomlinson*, 220 Fed. 2nd 894.

4. Section 294 (b) should not be construed to authorize collection of interest on interest in jeopardy cases. Contrary to *Brinck* v. *United States*, 173 F. Supp. 286, and *Grimsley* v. *Patterson*, 57 USTC para. 10025, Section 294 (b) of the Code does not require the collection of interest on interest in the case of jeopardy assessments. As has already been pointed out, in the case of an ordinary assessment there is only one "notice and demand from the collector", that which is issued after the Tax Court's determination. In the case of a jeopardy assessment, however, if the taxpayer petitions for a redetermination by the Tax Court, there will be two instances when the Commissioner issues such "notice and demand", the first when he issues the jeopardy assessment, and the second pursuant to Section 273 (i) after the Tax Court's decision. It is

from this fact that the ambiguity in Section 294 (b) develops, because it simply provides for collection of interest upon the amounts assessed from the date of notice and demand from the collector without specifying, in the case of a jeopardy assessment, which notice and demand. It would seem that the Court ought to resolve the ambiguity in favor of the taxpayer, as was pointed out in *Crolich* v. *United States*, supra. Interest should be compounded only from the date of the notice and demand from the collector [illegible] the determination of the Tax Court, or after the time for filing a petition in the Tax Court has expired.

5. Section 294 (c) provides "if a bond is filed, as provided in Section 273, the provision of sub-section (b) of this section shall not apply to the amount covered by the bond." If the construction of sub-division (b) is correct, it might seem that there would be no need for this sub-division (c) excluding the operation of sub-section (b) from amounts covered by a jeopardy bond. However, in view of the various possible situations in which jeopardy assessments can be made under Section 273, either before or after an ordinary deficiency letter, and either before or after a petition for a redetermination in the Tax Court, sub-division (c) may have been thought necessary in order to plug a possible gap or loop-hole. Furthermore, sub-section (f), which provides for the stay bond, refers only to a stay of collection of the amount of the assessment without specific reference to any interest, penalties, or other additional amounts. This provision in Section 294 (c) may have been thought necessary to make it clear that collection of any such additional amounts would also be stayed by the bond. This section is for the taxpayer who did not wish to appeal to the Tax Court, but put up a bond so that his assets would not be liquidated by the low prices

of a forced sale. This section was not intended as a penalty, and apparently Congress felt the construction was wrong, denied the Commissioner to assess interest on interest by the enactment of Section 6601 (f)(2). That a jeopardy assessment is merely a method of collecting an ordinary deficiency is made clear in the House and Senate Reports on the 1954 Internal Revenue Code.

See 1954 U.S. Code, Congress and Administrative News Pages 4565 and 5239.

6. It has been held that if Congress considers the treasury interpretation erroneous, it will amend the section.

Mass. Mutual Life Insurance Company v. *United States of America*, 288 U.S. 269, 273.

One of the major examples of fictitious legislative intent is that canon of construction, that when the administrative official places a certain construction upon an ambiguous statutory command, Congress presumably intended to adopt that construction if it thereafter reenacts the statutory language without change. Since Congress did change the Section, it would be presumed that the Commissioner's interpretation is wrongful.

7. If interest on interest is to be collected only when no bond is filed, the Commissioner discriminates against that taxpayer who is unable to file a bond. Such discrimination is unconstitutional. Arbitrarily to discriminate against one class of persons, without any reasonable basis for the classification, is a violation of the Due Process clause of the Fifth Amendment.

Bolling v. *Sharpe*, 347 U.S. 497.

Charles C. Steward Machine Company v. *Davis*, 301 U.S. 548, 584

Statutes, the effect of which were to grant or deny a right or privilege depending upon a person's ability to pay, have been declared unconstitutional as violative of Due Process and Equal Protection.

Griffin v. *Illinois*, 351 U.S. 12.
Eskridge v. *Washington State Board*, 357 U.S. 214.

The imposition of interest on interest is the same as levying a penalty on the taxpayer. Since jeopardy assessment is procedural in nature, Congress cannot possibly delegate to the Commissioner the privilege of levying fines. *Trop* v. *Dulles*, 356 U.S. 86, 96. There is nothing in the constitution whereby Congress could delegate such rights. The exacting of such a penalty is in violation of the Eighth Amendment.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Gerson Askinas
Counsel for Petitioners
347 Worthington Street
Springfield 3, Massachusetts

Appendix A

United States Court of Appeals

For the First Circuit

No. 5609.

DAVID GINSBURG ET AL.,

PLAINTIFFS, APPELLANTS,

v.

UNITED STATES OF AMERICA,

DEFENDANT, APPELLEE.

DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Gerson Askinas for appellants.

George F. Lynch, Attorney, Department of Justice, with whom *Charles K. Rice*, Assistant Attorney General, *Lee A. Jackson* and *Harry Baum*, Attorneys, Department of Justice, *Elliott L. Richardson*, United States Attorney, and *Andrew A. Caffrey*, Assistant U. S. Attorney, were on brief, for appellee.

OPINION OF THE COURT.

April 18, 1960.

ALDRICH, *Circuit Judge*. In this action appellant taxpayers, husband and wife, seek to recover interest paid in connection with jeopardy assessments under the Internal Revenue Code of 1939. The facts were stipulated. It appeared that in April, 1952 the Commissioner notified the appellants of deficiencies in their income taxes for the years 1946 and 1950. The notices also claimed fraud penalties and interest on the deficiencies. A few weeks prior to mailing the notices, the Commissioner had made

a jeopardy assessment, which included the interest to date on the deficiencies claimed. 1939 Code, §§273(a), 292(a). Appellants petitioned the Tax Court for a redetermination, but filed no bond under section 273(f) to stay collection. The Commissioner, nevertheless, did not enforce collection. Eventually the claim was compromised, and a decision entered by the Tax Court. The Commissioner then imposed interest on that portion of the jeopardy assessment which had been sustained, as a consequence of which part of appellants' payments constituted interest upon interest. For this portion they seek recovery. In the district court both parties moved for summary judgment. The court granted the government's motion, and dismissed the complaint.

In this court, although apparently not in the court below, appellants properly accept the government's view that section 294(b) of the Code provided for the collection of such interest upon interest in the case of jeopardy assessments where no bond has been given. *Brinck* v. *United States*, D.C.D.Mont., 1959, 173 F.Supp. 286; *Grimsley* v. *Patterson*, D.C.N.D.Ala., 57-2 U.S.T.C. ¶10,025; *Symonides* v. *Crenshaw*, D.C.E.D.Va., 53-2 U.S.T.C. ¶9,639. Contra, *Crolick* v. *United States*, D.C.S.D.Ala., 1956, 144 F.Supp. 109. What they now contend, however, is that had they posted a bond, such compounding would not have occurred, for which they cite section 294(c) as making section 294(b) inapplicable. Consequently, they claim that the collection of such interest constitutes discrimination based upon their failure to file a bond.

Examination discloses that while appellants correctly interpret section 294(c), they overlook section 297. This latter section specifically provides for interest on interest in cases where a bond has been given. *Signal Gasoline Corp.* v. *United States*, D.C.S.D.Cal., 1942, 46 F.Supp. 276, 280-81 (construing similar provisions of Revenue Act of

1928); see *Grimsley* v. *Patterson*, supra. Contra, *Crolich* v. *United States*, supra. In fact, the 1939 Code provides for "delinquency" interest on "deficiency" interest in every case where an assessment is not promptly paid. A party on whom there has been a jeopardy assessment, but who has posted no bond, is charged thereafter with interest upon interest from the date of notice and demand by the collector as the result of sections 292(a) and 294(b), combined. On the other hand, a taxpayer against whom there has been a jeopardy assessment, but who has posted a bond, will eventually pay the same interest on interest as a result of sections 273(i) and 297. No discrimination results from the failure to [illegible].

However, appellants raise another point not raised below. A taxpayer who receives an ordinary notice of deficiency may petition the Tax Court for a redetermination, and no assessment can be made until the termination of those proceedings. If on assessment he pays forthwith, he is charged only with simple interest on the deficiency from the due date to the date of assessment.[1] Section 292(a). But if during the course of these proceedings, a jeopardy assessment is made, from then on, as we have pointed out, whether he posts a bond or not, he will be charged with additional interest because of the compounding. In a brief regrettably as empty of citations as it is full of assertions, appellants contend that "the discretionary part" of a jeopardy assessment makes them "second class citizens," and that the interest provision is a penalty.[2]

---

[1] On the other hand, if thereafter the taxpayer fails to pay the deficiency and the "deficiency" interest, he is charged with "delinquency" interest on both from the date of notice and demand (following the assessment) to the date when he does pay. Section 294(b).

[2] Even when appellants say that their position is endorsed by "many tax writers," they fail to cite any. We assume there are such. See, e.g., 1 Casey, Federal Tax Procedure §2.15 (1955). We fail, however, to discover any judicial support.

A jeopardy assessment is made when the Commissioner "believes that the assessment or collection of a deficiency will be jeopardized by delay . . . ." 1939 Code, §273(a). Appellants do not, and could not, complain of the propriety of jeopardy assessments. The interest of the government in its right to collect taxes must be paramount, even though protection may bear more heavily on those who are financially less secure. Cf. *Rode* v. *Siebe*, 1898, 119 Cal. 518, 51 Pac. 869. Historically, all taxes were collected first, and litigated afterwards. Although it is now customary to give taxpayers the opportunity to "try now and pay later," this procedure is nonetheless to a certain degree a matter of grace. See *Phillips* v. *Commissioner*, 1931, 283 U.S. 589, 596 n.6, 51 S.Ct. 608, 611 n.6, 75 L.Ed. 1289. It is appropriate for Congress to delegate to the Commissioner the duty of determining when this privilege cannot safely be granted, and so to demand payment at once.[3] It having been properly determined that payment is to be made, the imposition of "delinquency" interest thereafter on the total amount assessed is a normal consequence of non-payment, and one that is uniformly applied throughout the statute. There being no valid objection to the dog, there can be none to the fact that, like all others, he has a tail.[4]

Judgment will enter affirming the judgment of the District Court.

---

[3] It has been suggested that this administrative determination is not sufficiently reviewable under present decisions, see, e.g., Kaminsky, Administrative Law and Judicial Review of Jeopardy Assessments Under the Internal Revenue Code, 14 Tax L. Rev. 545 (1959). However, appellants have contested not the use of the jeopardy assessment in their case, but only its effect.

[4] The practice of allowing interest upon interest was discontinued in the Internal Revenue Code of 1954 by section 6601(f)(2), 26 U.S.C. §6601(f)(2), a fact relied upon by appellants. But it should be noted that this section operates generally, thus indicating that the practice as a whole might be deemed unnecessary, and not that any particular application under prior statutes was discriminatory.

Appendix B

United States Court of Appeals
For the First Circuit

No. 5609.

DAVID GINSBURG ET AL.,

PLAINTIFFS, APPELLANTS,

v.

UNITED STATES OF AMERICA

DEFENDANT, APPELLEE.

FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Gerson Askinas for appellants.

George F. Lynch, Attorney, Department of Justice, with whom *Charles K. Rice*, Assistant Attorney General, *Lee A. Jackson* and *Harry Baum*, Attorneys, Department of Justice, *Elliott L. Richardson*, United States Attorney, and *Andrew A. Caffrey*, Assistant U. S. Attorney, were on brief, for appellee.

OPINION OF THE COURT
ON PETITION FOR REHEARING.

May 20, 1960.

ALDRICH, *Circuit Judge*. Appellants have filed a petition for rehearing, claiming that we erred in our underlying premise that a taxpayer who files a bond after a jeopardy assessment pays "interest on interest as a result of sections 273(i) and 297." Section 273(i) provides that "when the amount which should have been assessed has been determined by a decision of the Tax Court which has become final, then any unpaid portion, the collection of

which has been stayed by the bond, shall be collected . . . ." Appellants contend that "the amount which should have been assessed" means only the basic deficiency. This overlooks the fact that when the Commissioner has determined that a jeopardy assessment is to be made, section 273(a) provides for the assessment of the deficiency "together with all interest"; and that section 273(f) provides for staying the collection of the "amount of the assessment" by the filing of a bond which is "conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Tax Court which has become final, together with interest thereon as provided in section 297." See also section 273(g), which supplements sections 273(f) and (i) and section 297, by providing for the case in which the taxpayer files a bond to stay collection but then decides not to petition for a redetermination. We do not think that with respect to these sections generally the appellants could contend that the "assessment" stayed by the bond does not include deficiency interest, or that, under section 273(g) interest is not charged on interest.

Appellants do suggest, however, that "the amount which should have been assessed" (section 273(i)) is limited to the deficiency because, they claim, the Tax Court has no jurisdiction over interest. This may well be true with regard to deficiencies determined and assessed in the normal manner under section 272. See *Commissioner* v. *Kilpatrick's Estate*, 6 Cir., 1944, 140 F.2d 887. But section 273(c), dealing with jeopardy assessments, specifically provides that "the Tax Court shall have jurisdiction to redetermine the entire amount of the deficiency *and of all amounts assessed at the same time in connection therewith*." (Ital. supplied). This is to be compared with the more limited language of section 272(g), applicable to normal deficiency proceedings. Also compare section

273(i), "Collection of unpaid amounts," with section 272(b), "Collection of deficiency found by Tax Court," which further points up the distinction between jeopardy-assessment procedure and normal deficiency procedure.

The petition for rehearing is denied.

Appendix C

ternal Revenue Code of 1939:

SEC. 272. PROCEDURE IN GENERAL.

(a)(1) [As amended by Sec. 203 of the Act of December 29, 1945, c. 652, 59 Stat. 669] *Petition to the Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of Section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

(26 U.S.C. 1952 ed., Sec. 272.)

SEC. 273. JEOPARDY ASSESSMENTS.

(a) *Authority for Making.*—If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

(b) *Deficiency Letters.*—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 272(a), then the Commissioner shall mail a notice under such subsection within sixty day after the making of the assessment.

* * *

(f) *Bond to Stay Collection.*—When a jeopardy assessment has been made the taxpayer, within 10 days after notice and demand from the collector for the payment of the amount of the assessment, may obtain a stay of collection of the whole or any part of the amount of the assessment by filing with the collector a bond in such amount, not exceeding double the amount as to which the stay is desired, and with such sureties as the collector deems necessary, conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Board which has become final, together with interest thereon as provided in section 297. If any portion of the jeopardy assessment is abated by the Commissioner before the decision of the Board is rendered, the bond shall, at the request of the taxpayer, be proportionately reduced.

* * *

(i) *Collection of Unpaid Amounts.*—When the petition has been filed with the Board and when the amount which should have been assessed has been determined by a decision of the Board which has become final, then any unpaid portion, the collection of which has been stayed by the bond, shall be collected as part of the tax upon notice and demand from the collector, and any remaining portion of the assessment shall be abated. If the amount already collected exceeds the amount determined as the amount which should have been assessed, such excess shall be credited or refunded to the taxpayer as provided in section 322, without the filing of claim therefor. If the amount determined as the amount which should have been assessed is greater than the amount actually assessed, then the difference shall be assessed and shall be collected as part of the tax upon notice and demand from the collector.

(26 U.S.C. 1952 ed., Sec. 273.)

SEC. 292. INTEREST ON DEFICIENCIES.

(a) [As amended by Sec. 2(a)(1) of the Act of December 17, 1943, c. 346, 57 Stat. 601, and Sec. 14(c), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231] *General Rule.*—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first install-

ment) to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. If any portion of the deficiency assessed is not to be collected by reason of a prior satisfaction, in whole or in part, of the tax, proper adjustment shall be made with respect to the interest on such portion.

* * *

(26 U.S.C. 1952 ed., Sec. 292.)

SEC. 294. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT.

(b) *Deficiency.*—Where a deficiency, or any interest or additional amounts assessed in connection therewith under section 292, or under section 293, or any addition to the tax in case of delinquency provided for in section 291, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid. If any part of a deficiency prorated to any paid installment under section 272(i) is not paid in full on or before the date prescribed for the payment of such installment, there shall be collected as part of the tax interest upon the unpaid amount at the rate of 6 per centum per annum from such date until it is paid.

(c) *Filing of Jeopardy Bond.*—If a bond is filed, as provided in section 273, the provisions of subsec-

tion (b) of this section shall not apply to the amount covered by the bond.

(26 U.S.C. 1952 ed., Sec. 294.)

SEC. 297. INTEREST IN CASE OF JEOPARDY ASSESSMENTS.

In the case of the amount collected under section 273(i) there shall be collected at the same time as such amount, and as a part of the tax, interest at the rate of 6 per centum per annum upon such amount from the date of the jeopardy notice and demand to the date of notice and demand under section 273(i), or, in the case of the amount collected in excess of the amount of the jeopardy assessment, interest as provided in section 292. If the amount included in the notice and demand from the collector under section 273(i) is not paid in full within ten days after such notice and demand, then there shall be collected, as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid.

(26 U.S.C. 1952 ed., Sec. 297.)

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No. 337

In the Supreme Court of the United States

OCTOBER TERM, 1960

DAVID GINSBURG ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
HARRY BAUM,
GEORGE F. LYNCH,
Attorneys,
Department of Justice, Washington 25, D.C.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 14–20) is reported at 278 F. 2d 470.

JURISDICTION

The judgment of the Court of Appeals was entered on April 18, 1960, and a timely petition for rehearing was denied on May 20, 1960. The petition for a writ of certiorari was filed on August 18, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 294(b) of the Internal Revenue Code of 1939 provides that where a deficiency, or any interest

or additional amounts assessed in connection therewith, is not paid in full within ten days from the date of notice and demand, there shall be collected, as a part of the tax, interest upon the unpaid amount from the date of notice and demand until the date of payment.

Is the Commissioner prohibited from collecting such interest upon that portion of the amount of a jeopardy assessment which includes deficiency interest merely because no bond to stay collection was filed by the taxpayer?

STATUTES INVOLVED

Sections 272(a)(1), 273 (a), (b), (1), (4), 294 (b), (c), and 297 of the Internal Revenue Code of 1939 are set forth in the Appendix, *infra*, pp. 10–14.

STATEMENT

This action originates as one in which taxpayers, husband and wife, sought to recover interest paid in connection with jeopardy assessments of income tax for the years 1946 and 1950. There was no dispute as to the material facts, most of which were stipulated (R. 15–16), and both parties moved for summary judgment.

On or about March 21, 1952, the Commissioner of Internal Revenue, acting under authority of Section 273 of the Internal Revenue Code of 1939, Appendix, *infra*, p. 10, made jeopardy assessments against the taxpayers for the years 1946 and 1950. The amount of the assessments included the tax deficiency as determined by the Commissioner, a fraud penalty, and interest to the date of assessment. The taxpayers

petitioned the Tax Court of the United States for a redetermination of the deficiencies found for each year, but filed no bond under Section 273(f) to stay collection. The Commissioner, nevertheless, did not enforce collection although notice and demand for payment had been made. Pursuant to the stipulations executed by the parties, the Tax Court entered decisions holding the taxpayers liable for deficiencies less than those assessed by the Commissioner. The jeopardy assessments were revised to show deficiencies, interest, and penalties conforming to the Tax Court decisions and the balance of each of the jeopardy assessments was abated. Taxpayers paid the amount of the revised assessments. (R. 15–16, 17.)

Acting under the provisions of Section 294(b), the Commissioner than computed and assessed interest on the total amount of the revised assessment for each of the taxable years. Taxpayers paid these amounts, and filed timely claims for refund. (R. 16, 17–18.)

Both parties moved for summary judgment. (R. 14.) The District Court held that, since no bond had been filed to stay collection of the jeopardy assessments, the provisions of Section 294(b) were applicable, and hence that the Commissioner properly assessed interest on the interest included in the jeopardy assessments. Accordingly, it granted the motion of the United States for summary judgment, but, due to errors in computation of delinquency interest assessments which resulted in an actual overpayment by the taxpayers, and pursuant to stipulation of the parties, the court entered judgment for the taxpayers in the amount of $446.76. (R. 16, 18–19.)

On appeal, the Court of Appeals for the First Circuit affirmed the judgment of the District Court, and subsequently denied the taxpayers' petition for rehearing. (Pet. 17, 20.)

ARGUMENT

This case presents a narrow issue which was correctly decided by the courts below, and there is no conflict. Moreover, the issue is not a recurring one since it arises under provisions of the Internal Revenue Code of 1939 which do not appear in the 1954 Code.

1. The issue here concerns the right of the Commissioner of Internal Revenue to assess and collect interest on deficiency interest under Section 294(b) of the Internal Revenue Code of 1939 in the case of jeopardy assessments, where no bond had been filed as provided in Section 273(f). Both courts below held that the assessment and collection of such interest on interest was clearly provided for by statute. Rejecting taxpayers' contention that such action constituted discrimination based upon their failure to file a bond, the Court of Appeals stated (Pet. 16):

> A party on whom there has been a jeopardy assessment, but who has posted no bond, is charged thereafter with interest upon interest from the date of notice and demand by the collector as the result of sections 292(a) and 294(b), combined. On the other hand, a taxpayer against whom there has been a jeopardy assessment, but who has posted a bond, will eventually pay the same interest on interest

as a result of sections 273(i) and 297. No discrimination results from the failure to file a bond.

Section 273(a) provides that, if the Commissioner believes that the collection of an asserted deficiency will be "jeopardized by delay," he shall immediately assess such deficiency "together with all interest, additional amounts, or additions to the tax provided for by law," and serve notice and demand for its payment. Section 273(f) permits a taxpayer who receives a jeopardy assessment notice and demand to file a bond and to "obtain a stay of collection of the whole or any part of the amount of the assessment," pending the determination of the correct tax. Section 273(i) provides that when the amnt which should be assessed has been determined the Tax Court, "any unpaid portion, *the collection of which has been stayed by the bond*, shall be collected as part of the tax upon notice and demand from the collector," and any remaining portion of the tax shall be abated (emphasis added).

Complementing Section 273 is Section 297, which requires the collection as a part of the tax of interest upon the amount stayed by the bond, from the date of notice of the jeopardy assessment to the date of notice and demand under Section 273(a). Section 297 says nothing with respect to a case, such as the instant one, where a taxpayer has failed to file a bond to stay the collection of a jeopardy assessment pending a final determination of such assessment by the Tax Court; it is operative only where a bond has been

filed under Section 273. However, where no bond has been filed, Section 294(b) applies; this is evident from the provisions of Section 294(c), wherein Congress explicitly excluded from the coverage of Section 294(b) the situation where a taxpayer failed to pay the jeopardy assessment because he had posted the bond. In such a situation, Congress provided that Section 294(b) "shall not apply to the amount covered by the bond," leaving the clear inference that it does apply to amounts in excess of or amounts not covered by a bond. Furthermore, Section 294(b) clearly authorizes the imposition of the interest here in question, for it provides that—

> Where a deficiency, *or any interest or additional amounts assessed in connection therewith* under section 292, or under section 293, or any addition to the tax in case of a delinquency provided for in section 291, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, *interest upon the unpaid amount* at the rate of 6 per centum per annum from the date of such notice and demand until it is paid * * * [emphasis added].

Obviously, Section 294(b) concerns itself with *deficiencies* and *additions to the tax* considered as part of the tax deficiencies, without any attempt to distinguish between the two methods of assessment, *i.e.*, ordinary or jeopardy.

These provisions of the 1939 Code amply support the construction made by the Commissioner and sus-

tained by the courts below. The position of the Government is also supported by *Brinck* v. *United States*, 173 F. Supp. 286 (D. Mont.); *Grimsley* v. *Patterson* (N.D. Ala.), decided October 31, 1957 (57-2 U.S.T.C., par. 10,025); *Symonides* v. *Crenshaw* (E.D. Va.), decided October 27, 1953 (53-2 U.S.T.C., par. 9,639). But see *Crolich* v. *United States*, 144 F. Supp. 109 (S.D. Ala.), which apparently has not been followed.

Taxpayers' confusion stems from a failure to perceive the interrelation of the various statutory provisions dealing with assessment and collection of interest. Under the normal assessment procedure, an assessment is made only after notice has been given to the taxpayer, indicating the amount of the proposed deficiency, and after allowing 90 days in which to petition the Tax Court to set it aside. Should the taxpayer elect to exercise his right to appeal from the Commissioner's proposed deficiency, there can be no assessment until after the final redetermination by that tribunal. Internal Revenue Code of 1939, Section 272(a)(1) (Appendix, *infra*, p. 10). If the 90-day period expires, however, without the taxpayer having taken advantage of his right to appeal to the Tax Court, the *deficiency is assessed, together with interest* from the date upon which the tax was originally due to the date of such assessment, and interest upon *that total* sum may be collected by virtue of Section 294(b). But in the case of a jeopardy assessment, the deficiency and the assessment arise simultaneously, and the provisions of Section 273(a) unmistakably declare that the jeopardy assessment shall

include interest from the due date of payment to the date of the assessment. The taxpayer still has his right of appeal to the Tax Court. He may stay collection of the amount assessed by filing a bond as provided in Section 273(f). Section 297 provides that, *if* he files such a bond, the amount thereby covered is chargeable with interest at six per cent from the date of the jeopardy assessment to the date of actual payment. If he files no bond, then, by virtue of Section 294(c), the deficiency is treated like any other deficiency, and the taxpayer is charged with the same delinquency interest. Thus, contrary to taxpayers' contention, no discrimination results from failure to file a bond. Indeed, to relieve taxpayers of the obligation to pay interest on assessed deficiency

2. In any event, the problem is of no future importance since, as noted in the opinion below (Pet. 17, fn. 4), the provisions of the Internal Revenue Code of 1939 relating to interest on interest were discontinued in the 1954 Code. While Section 6601(a) of the 1954 Code states the general rule that interest on under-payments of tax runs from the due date of payment to the date paid, Section 6601(f)(2) expressly provides that "[n]o interest under this section shall be imposed on the interest provided by this section." See H. Rep. No. 1337, 83d Cong., 2d Sess., p. A417 (3 U.S.C. Cong. & Adm. News 4017, 4565 (1954)); S. Rep. No. 1622, 83d Cong., 2d Sess., p. 589 (3 U.S.C. Cong. & Adm. News 4621, 5238 (1954)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

HARRY BAUM,
GEORGE F. LYNCH,
Attorneys.

OCTOBER 1960.

APPENDIX

Internal Revenue Code of 1939:

SEC. 272. PROCEDURE IN GENERAL.

(a)(1) [As amended by Sec. 203 of the Act of December 29, 1945, c. 652, 59 Stat. 669] *Petition to the Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

* * * * * * *

(26 U.S.C. 1952 ed., Sec. 272.)

SEC. 273. JEOPARDY ASSESSMENTS.

(a) *Authority for Making.*—If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay,

he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

(b) *Deficiency Letters.*—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 272(a), then the Commissioner shall mail a notice under such subsection within sixty days after the making of the assessment.

* * * * * *

(f) *Bond to Stay Collection.*—When a jeopardy assessment has been made the taxpayer, within 10 days after notice and demand from the collector for the payment of the amount of the assessment, may obtain a stay of collection of the whole or any part of the amount of the assessment by filing with the collector a bond in such amount, not exceeding double the amount as to which the stay is desired, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Tax Court which has become final, together with interest thereon as provided in section 297. If any portion of the jeopardy assessment is abated by the Commissioner before the decision of the Tax Court is rendered, the bond shall, at the request of the taxpayer, be proportionately reduced.

* * * * * *

(i) *Collection of Unpaid Amounts.*—When the petition has been filed with the Tax Court and when the amount which should have been assessed has been determined by a decision of the Tax Court which has become final, then any unpaid portion, the collection of which has been stayed by the bond, shall be collected as part

of the tax upon notice and demand from the collector, and any remaining portion of the assessment shall be abated. If the amount already collected exceeds the amount determined as the amount which should have been assessed, such excess shall be credited or refunded to the taxpayer as provided in section 322, without the filing of claim therefor. If the amount determined as the amount which should have been assessed is greater than the amount actually assessed, then the difference shall be assessed and shall be collected as part of the tax upon notice and demand from the collector.

* * * * *

(26 U.S.C. 1952 ed., Sec. 273.)

SEC. 292. INTEREST ON DEFICIENCIES

(a) [As amended by Sec. 2(a)(1) of the Act of December 17, 1943, c. 346, 57 Stat. 601, and Sec. 14(c), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231] *General Rule.*— Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. If any portion of the deficiency assessed is not to be collected by reason of a prior satisfaction, in whole or in part, of the tax, proper adjustment shall be made with respect to the interest on such portion.

* * * * *

(26 U.S.C. 1952 ed., Sec. 292.)

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

* * * * *

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d)(2).

* * * * *

(26 U.S.C. 1952 ed., Sec. 293.)

SEC. 294. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT.

* * * * *

(b) *Deficiency.*—Where a deficiency, or any interest or additional amounts assessed in connection therewith under section 292, or under section 293, or any addition to the tax in case of delinquency provided for in section 291, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid. If any part of a deficiency prorated to any unpaid installment under section 272(i) is not paid in full on or before the date prescribed for the payment of such installment, there shall be collected as part of the tax interest upon the unpaid amount at the rate of 6 per centum per annum from such date until it is paid.

(c) *Filing of Jeopardy Bond.*—If a bond is filed, as provided in section 273, the provisions of subsection (b) of this section shall not apply to the amount covered by the bond.

* * * * *

(26 U.S.C. 1952 ed., Sec. 294.)

SEC. 297. INTEREST IN CASE OF JEOPARDY ASSESSMENTS.

In the case of the amount collected under section 273(i) there shall be collected at the same time as such amount, and as a part of the tax, interest at the rate of 6 per centum per annum upon such amount from the date of the jeopardy notice and demand to the date of notice and demand under section 273(i), or, in the case of the amount collected in excess of the amount of the jeopardy assessment, interest as provided in section 292. If the amount included in the notice and demand from the collector under section 273(i) is not paid in full within ten days after such notice and demand, then there shall be collected, as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid.
(26 U.S.C. 1952 ed., Sec. 297.)

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